STATE OF WASHINGTON

ENERGY FACILITY SITE EVALUATION COUNCIL

PO Box 43172 • Olympia, Washington 98504-3172

June 21, 2001

MEMORANDUM

To: Persons Interested in Energy Facility Site Evaluation Council Rules
From: Mark Anderson, EFSEC Rules Coordinator
Subject: Chair Deb Ross' White Paper on EFSEC Rules Review

On June 18, 2001, the Washington State Energy Facility Site Evaluation Council (EFSEC or Council) directed staff to initiate a review of its rules. The Council also directed staff to make available to the public a White Paper on EFSEC Rules Review authored by EFSEC Chair Deb Ross.

In her final months as EFSEC Chair, Deb Ross has spent considerable time and effort reviewing EFSEC's rules. She has drafted a white paper that describes her view of what issues may arise in this rulemaking and what the scope of the rulemaking might be. While the full Council may not agree with every element in the paper, it provides a wealth of information and analysis applicable to the rulemaking based on Chair Ross' considerable insight and knowledge as the Council's Chair over the past three and a half years. The Council wishes the public to have access to this document and to consider the implications it has for this rulemaking, both procedurally and for content. The white paper is available on the EFSEC web site at www.efsec.wa.gov/rulerev.html, or can be requested from the EFSEC Rules Coordinator with the contact information provided in the CR-101 Notice.

(360) 956-2121 Telefax (360) 956-2158

White Paper on EFSEC Rules Review
Deb Ross, EFSEC Chair
June 18, 2001

Introduction and Background

In the thirty years since the Energy Facility Site Evaluation Council (EFSEC or Council) enabling statute, RCW 80.50, was enacted, the Council has adopted a number of rules, codified into title 463 of the Washington Administrative Code. While EFSEC's rules have been reviewed and updated over the years, EFSEC has not recently undertaken a comprehensive review to determine whether and where changes might be warranted. In 1997, when Governor Gary Locke took office, all state agencies were asked to review their rules to determine whether they could be updated, made more efficient and understandable, and respond better to the needs of the agencies' customers and stakeholders. The Council initiated this effort and did make several, largely technical, changes to its rules. However, in late 1999 this effort was suspended, due to a number of factors, including staffing constraints, as well as ongoing discussions about possible legislation that could make significant changes to EFSEC's statutory mandates.

In 2000, the legislature convened a task force to look at state energy facility siting issues. The task force recommended a number of changes, both to EFSEC's statutes and procedures. As a result, legislation was passed (HB 2247) that did make several of the recommended changes. In early 2001, in response to the regional energy situation, Governor Locke asked Charles Earl to make additional recommendations on how to improve the efficiency of energy facility siting activities. Among Mr. Earl's recommendations were suggestions for rule changes.

The Council has agreed that it is time to take a close look at EFSEC's rules. This review is needed in order to respond to statutory changes, implement permanent procedural improvements, better reflect current practice, and correct technical errors and inconsistencies that may have existed for a number of years but have not been addressed.

The purpose of this paper is to identify several of the types of changes that might be warranted and to seek stakeholder input concerning these and other beneficial changes. This paper is structured to assist stakeholders in commenting to the Council, by identifying some areas that may benefit from changes, deletions or corrections to Council rules. Stakeholders are invited and requested to comment on any or all of these issues, and to bring additional concerns and suggestions to the Council's attention. Stakeholders are also requested to pass this paper along to others who may be interested, or to contact EFSEC staff with additional names and addresses of people who may be interested in commenting.

This paper identifies five categories of situations in which rule changes may be warranted. Each is addressed in a separate section, though to some extent the categories overlap.

- Rulemaking issues that arise as a result of ***statutory changes*** made since rules were last changed;
- Rule changes that may lead to ***improved fairness and efficiency***;
- Rule changes to reflect ***current practices*** that are not now explicitly reflected in rules;
- Potential improvements to rules to make them ***clearer and easier to understand***; and
- ***Technical changes*** that may be needed such as spelling, terminology.

Each section attempts to identify at least some of the rule sections that may need addressing and, in some cases, articulates alternative ways that the current rules might be improved on.

I. Statutory changes

A number of statutory changes have occurred that may affect EFSEC's rules. These include the recent enactment of HB 2247 that amends EFSEC's enabling legislation, chapter 80.50, as well as statutory changes to other chapters of RCW and, possibly, federal law.

A. HB 2247

Section 1 sets forth a goal "to avoid costly duplication in the siting process and ensure that decisions are made timely and without unnecessary delay." Stakeholders are invited to comment on whether, and how best, to achieve these goals through rule changes, including addressing the issues discussed in the remainder of this memorandum.

Section 2 provides for an opt-in for facilities that use alternative resources (defined in section 3, generally renewable resources). Stakeholders are invited to identify rules that would require changes to accommodate this new opt-in provision. Possible areas for change include the following:

- 463 chapter 42 – whether additional information should be provided in application for opt-in facilities, e.g., describing the type of facility and the resources used. 463-42-362 – what distances from opt-in plants should applicants use for surveying present land uses?
- 463-42-362 – what distances from opt-in plants should applicants use for identifying applicable land use ordinances?

- 463-43-020 – clarify whether and when an opt-in facility is eligible for expedited processing. The statute (RCW 80.50.075) itself only provides for expedited processing for a facility that is "required to" apply. However, the council may adopt procedural rules for expediting opt-in applications as well.

Section 4 changes the term "chairman" to "chair" with a salary, alters makeup of the council, and creates a new category of council member that may opt to participate in specific site reviews. Possible areas for change include the following:

- 463-06-020 Description of organization
- 463 chapter 18, desirability of setting forth processes to identify voting and section procedures for "permanent" and "temporary" or "limited" members.
- 463-38-051(2) Clarify who is entitled to vote on an NPDES permit
- Change all references from "chairman" to "chair" to reflect new terminology (see 463-18-040, 060, 070)
- 463-58-030 – include chair salary

Section 5 describes mandatory and optional staff roles. Stakeholders are invited to comment on whether staffing roles should be identified in rules, and, if so, what they should be.

Section 6 makes compliance monitoring optional. Possible areas for change include all of chapter 54. Stakeholders are invited to comment, for example, on whether the council should be charged with reviewing all existing site certification agreements to determine whether compliance should be passed on to underlying state or local authorities, and, if so, what would be a reasonable timeframe for this review. Should standards be established for retaining or relinquishing compliance oversight? If so, what should they be?

Section 7 implements the recommendation of the 2000 task force in requiring only an informational public hearing within 60 days after receipt of an application, instead of a finding of consistency with local land use ordinances. This section may affect several provisions in current rules, including (in the order they appear in rules):

- 463-14-030
- Chapter 26
- Chapter 28 (since consistency finding may not occur at outset of proceeding, this chapter will require review to determine how it can work procedurally)
- 463-43-040(2), 050

B. Energy and Environmental Policy Legislation

The revised code of Washington includes a number of expressions of energy policy, both in chapter 80.50 and elsewhere. For example, since EFSEC's rules were enacted, the legislature passed RCW 43.21F.015, which articulates the state's energy policy. Currently, chapter 14 of title 463 (the "policy" chapter) refers only to one statutory policy by which the council is to be guided, that is RCW 80.5-0.010(1), (2), and (3), and even

then the rule quotes a portion, but not all, of 80.50.010. The state's statutory environmental policy, RCW 43.21C.120, is included in EFSEC's rules, but in a different chapter (14-100). Since EFSEC is bound to observe all statutory expressions of energy policy, should there be a more comprehensive and unified expressions of applicable statutes in chapter 14?

C. Public Disclosure, Ethics (42 RCW)

RCW 42.17.300 now requires agencies to charge the actual cost of copying materials (with a "default" price of 15 cents per page), and not to charge for staff time. This appears to require a change to 463-06-110.

RCW 42.52 defines the ethical obligations of "state officers," which appears to include council members. Stakeholders are invited to comment on whether a rule should be enacted that points this out, and whether the individual conflict of interest rules in 463-38-090 and 39-170 may be inconsistent with 42.52 and should be repealed.

D. Growth Management Act (RCW 36.70A)

RCW 36.70A, the Growth Management Act, was enacted since EFSEC. Stakeholders are invited to comment on whether the council should acknowledge the existence of GMA by, for example, including a reference to GMA in the rules for land use consistency findings in chapter 26. (This was recommended by some participants in the 2000 legislative task force.) Stakeholders are invited to comment on whether the enactment of GMA also has implications for the procedures outlined in chapter 28 (see above).

E. Administrative Procedures Act (RCW chapter 34)

New provisions of the APA (chapter 34.12), enacted since RCW 80.50, constrain state agencies from appointing a presiding officer other than an Administrative Law Judge from the Office of Administrative Hearings, unless the presiding officer is the decision making body itself. The council typically acts as presiding officer as a body, but appoints or hires "facilitators," who may be delegated authority to conduct hearings, rule on nondispositive motions, etc. Stakeholders are invited to comment on the extent to which chapter 30 should be amended to reflect these statutory changes. These may include, for example:

- 463-30-020
- 463-30-270
- 463-58-030

F. Unfinished Nuclear Plants

Legislation enacted in 1996 created special provisions for terminating unfinished nuclear plants (see RCW 80.50.100(4) and 80.50.300). Stakeholders are invited to comment on how rules should be changed to reflect these special provisions. See, for example,

- 463-36-020
- 463-36-090
- 463-42-665
- 463-42-680

See also discussion below regarding termination rules.

G. Federal Air and Water Programs

Stakeholders are invited to comment on whether rule changes are needed to accommodate any recent changes to federal air and water statutes and rules and their implementation by state agencies. See chapter 38 and 39.

H. Sole Source Aquifers

Legislation enacted in 1991 (RCW 80.50.105) requires the council to "give appropriate weight" to city or county facility siting standards to protect sole source aquifers. Stakeholders are invited to comment on whether existing rules are adequate to reflect this statutory requirement, or whether additional rules are warranted. For example, does the information required in chapter 42 contain sufficient information about sole source aquifers, and does the land use consistency finding process adequately reflect this statutory provision? Should the term "appropriate weight" be defined in rule?

I. Other statutory changes

Are there are other statutory changes that require amendments to EFSEC's rules?

II. Improved Efficiency and Fairness

Legislators, advisors, and stakeholders have been united in their view that EFSEC needs to adopt reforms that will improve the efficiency of the siting process, consistent with the requirements of fairness, openness and due process. The Council has proposed a number of procedural changes designed to improve efficiency and are implementing these to the extent they are consistent with current rules. In some cases, identified efficiency improvements cannot be made without changes to rules. This section attempts to identify which areas of practice might be changed to improve efficiency and fairness, and possible rule changes that might be needed or warranted to implement these changes. Stakeholders are invited to comment on 1) whether the identified changes would, in fact, increase efficiency; 2) if so, whether the improved efficiency would unduly interfere with other interests such as fairness, public involvement and due process; and 3) whether there are other changes that would be preferable or should be implemented in addition to the ones identified here.

A. Potential Site Study

Chapter 22 sets forth a procedure for undertaking potential site studies. Stakeholders are invited to comment on:

- whether chapter 22 should include a provision encouraging applicants to undertake potential site studies, consistent with the council's current expressed preference;
- whether chapter 22 should have a clearer expression of the types of topics covered in a potential site study, including, as is currently the practice, input from governmental entities, the public, and organizations (cf. 463-22-050);
- whether the council should allow the termination of a potential site study before completion (see 463-22-080);
- whether the council should permit a potential site study to proceed before an applicant has indicated it is willing to fund its entire cost (see 463-22-090);
- whether it should be clearer in chapter 50 that the same independent consultant who performs the potential site study generally also performs the additional analysis described in 463-50-040;
- whether there should be a system of incentives to encourage participation in potential site studies by potential applicants (e.g., whether time limits for council action, e.g., reviewing an application for completeness should be shorter for applicants who perform potential site studies);
- whether there should be a system of incentives to encourage participation in potential site studies by stakeholders (e.g., whether intervention should be limited to those who participate as commenting stakeholders in potential site studies – see 463-30-060 regarding automatic intervention rights of member state agencies, and 463-30-400 and 410 regarding intervention rights of others)
- whether an application should be explicitly required to include information gleaned from the potential site study (in particular, identified stakeholder concerns) in its application (see 463-42-065)

B. Application and Application Review

Standards. During the 2000 task force, a number of stakeholders commented favorably on the Oregon procedural requirements for applications as a possible model for the EFSEC process. The Oregon statute and rules set forth explicit standards that an applicant must meet in order to qualify for site certification. EFSEC's application standards are less explicit than Oregon's. Stakeholders are asked to comment on whether the "standards-based" Oregon model should be adopted, and, if so, what types of standards should be adopted each application element.

Completeness review. Stakeholders are also invited to comment on whether there should be an explicit provision for formal council review of the completeness of an application and its consistency with the provisions of chapter 42. Should an application be deemed "received" for the purpose of chapter 80.50.090(1) and 100(1) only after the council has found it to be complete? See, e.g.,

- Chapter 42, which sets forth application requirements but does not currently have a provision for finding an application to be complete or consistent with the rules;
- 463-30-090 regarding publicity about an application
- Chapter 43, which requires a complete application before determining whether expedited processing is warranted.

Land and water interests. Stakeholders are invited to comment on whether the application should include a demonstration that the applicant either has title, right of way, option, or similar right to construct and maintain the proposed facility, or has eminent domain power, and has acquired any other potentially necessary entitlements. Placing this issue "on the table" at the application stage may help in identifying whether the need to acquire land and other entitlements may present an impediment to the building the proposed facility. To the extent that eminent domain power over publicly owned lands, as well as other entitlement issues, are still unresolved, identifying this as an unresolved in the application will bring the question to decision makers' and stakeholders' attention.

C. Environmental Impact Statement Preparation

Under the informal procedures currently in place, the council expects that draft environmental impact statements will be prepared before initiation of adjudicative proceedings. The council believes that issuing a draft EIS before adjudication starts assists applicants and participants to identify and narrow major issues and improve the efficiency of the adjudicative process. Stakeholders are invited to comment both on this practice, and on whether, in addition, final EISs should also be issued before adjudication. Issuing a final EIS before adjudication would appear to require an amendment to 463-47-060(3). The current rule and practice of not issuing a final EIS until after adjudication is complete is inconsistent with the spirit of SEPA and with SEPA practices in other agencies, because EISs are intended to guide decision makers, rather than explain or justify decisions already reached.

D. Adjudication

Stakeholders are invited to comment on whether the criteria for intervention should be changed, for example, by removing automatic intervention rights for "member agencies" and substituting an intervention standard that requires participation in earlier phases of application review, as in Oregon. See 463-30-060 regarding automatic intervention rights of member state agencies, and 463-30-400 and 410 regarding intervention rights of others.

E. Voting

Three separate rules in title 463 articulate an interpretation of the voting rights of local members. These are 463-14-040, 463-18-080, and 463-30-420. Under these rules, the voting procedures for any multijurisdictional project must be segmented so that "local" members can only vote on "issues affecting their jurisdiction." The actual language of the RCW reads as follows: "The member or designee … shall sit with the council only at such times as the council considers the proposed site for the county [or city] which he or she represents …." RCW 80.50.030(4), (5). Stakeholders are invited to comment on whether the current rules limiting local members' voting rights only to local issues are a correct interpretation of the RCW, or whether instead the RCW is intended only to clarify that once a siting decision has been made, the local members no longer serve on the Council. In addition, stakeholders are asked to comment on whether three separate rules articulating the same principle are required.

F. Preemption Policy

RCW 80.50.110 provides that chapter 80.50 preempts and supersedes any conflicting laws, rules or regulations relating to energy siting. However, the council is also required under RCW 80.50.100 to protect the interests and recognize the purpose of these laws in its recommendation to the governor. WAC 463-28-040 sets forth a limited mechanism for achieving this in the case of reported inconsistency with local land use ordinances. Stakeholders are invited to comment on whether the principles articulated in 463-28-040 should be more broadly extended to other instances where the council is asked to supersede otherwise applicable laws, regulations, and ordinances, for example, use of public lands for energy facilities, altering a water rights queue, building in critical areas,

etc. Alternatively, should a different mechanism or set of principles be applied for each type of preemption?

G. Funding

For council members. Should the current rule requiring applicants to fund council members' participation after 10 days of hearings be expanded to include more funding, for example, for all hearing days? See WAC 463-30-055.
For intervenors. Should there be funding for intervenor agencies, localities, or others?

H. Expedited Processing

A number of stakeholders have observed that the current rules for expedited processing (chapter 43) could be improved. First, they shed little additional light, beyond parroting the language of RCW 80.50.075 on the circumstances under which expedited processing would be granted. Second, the mechanism for public and stakeholder involvement in the determination of expedited processing is not clear. (As noted above, some of the statutory changes made in HB 2247 will require revisiting the current procedures for expedited processing, both for "alternative resources" and for traditional facilities where land use consistency is unclear.) Stakeholders are invited to comment on whether the expedited processing rules should be made more objective (e.g., what types of facilities/impacts would warrant an expedited proceeding), and whether there should be formal mechanism for challenging or participating in an expedited process. California's new rules for fast track siting, as well as the Oregon procedures for application review, could be referred to as possible models.

I. Other Efficiency and Fairness Improvements

Stakeholders are invited to comment on whether other rule changes could be implemented to improve the efficiency and fairness of the siting process.

III. Current practices not explicitly reflected in rules

This section addresses areas where the council has instituted a policy or practice, but that practice has not been explicitly addressed in rules. Stakeholders are invited to comment both on whether these practices are warranted and on whether a rule change to make them explicit is needed or advisable. This section is organized by chapter for ease of reference.

A. Chapter 14 – Policy and Interpretation

Report to governor. Stakeholders are invited to comment on whether a rule should clarify what the council's report to the governor should consist of. Some members of the 2000 task force commented that EFSEC statutes or rules should be clearer on what is in the "record" that goes to the governor.
Preemption. See question above regarding preemption policy. Should there be a rule that explicitly articulates what the council's policy should be on preempting applicable laws, ordinances and regulations? If so, what should it be?

Public comment. Should there be a rule that articulates the current practice of providing for a period of public comment at each regular council meeting, and no regular open public comment period at executive committee meetings?

B. Chapter 30 – Adjudicative Proceedings

Stipulations. The council currently adopts the practice of other quasi-judicial agencies in requiring presentation of substantial competent evidence in support of stipulations. Further, stipulations typically address not only "agree[ment] on the facts" but more generally resolution of disputed matters and agreed-upon mitigation measures. Should rules be changed to reflect these current practices? See WAC 463-30-250.

Hearing schedule guidelines. WAC 463-30-300 contains a prescriptive list of issues that must be segmented in an adjudicative hearing. Current practice is actually much more flexible, depending on time constraints, contested issues, geographic issues, etc. Should the rule be changed to allow more flexibility to the presiding officer or facilitator to segment an adjudication in a way that is fairest and most efficient?

Presiding officer powers. No WAC currently articulates the powers of the presiding officer or facilitator during the course of a hearing. Should the council adopt model rule of procedure WAC 10-28-200 to make this explicit?

Initial and final recommendation. EFSEC is unique in having a formal adjudication that results in a recommendation to the governor rather than an appealable final order under the APA. While current rules refer to "initial and final orders," RCW 80.50 does not refer to the council's action as a final order. However, while the council's recommendation to the governor is not termed an "order," the council does follow the same general format for initial and final orders. (The council has not in the past used an ALJ as a presiding officer and so has not typically used the optional initial order/final order process. However, there is no reason why an initial order/final order process could not be used in future siting processes.) Stakeholders are invited to comment on whether the rules should be changed to reflect the fact that the council's recommendation is not, strictly speaking, a final order, but that the same process is used as though it were a issuing a final order under the APA. See, e.g.,

- 463-30-320
- 463-30-330
- 463-30-335

Transmittal to governor. In the recent Sumas proceeding, the applicant asked that a time period should be established after the council's vote on a recommendation but before transmittal to the governor, in case petitions for reconsideration were anticipated. This seemed a sensible procedure to adopt, and the request was granted. Should this practice be memorialized in a rule? See

- 463-30-390

C. SCA Amendments – Chapter 36

Note: the procedures for amendments will be discussed more fully in section IV below.

Significant amendments. Current practice is that "significant amendments," i.e., those requiring gubernatorial approval, are conducted as adjudicative proceedings. Should this practice be made explicit in rules?

Supplemental EIS. SEPA appears to require a SEPA review to determine whether a proposed amendment requires a supplemental or addendum EIS. Should this practice be made explicit in rules?
Termination, Alternate uses. Rules are silent concerning appropriate activity at a site that has a site certification agreement but it does not appear that an energy facility will be built or completed. Current practice is that any use of the land inconsistent with the site certification agreement or site restoration plan needs to be explicitly approved by the council. Is this practice reasonable? If so, should it be articulated in rules?

D. NPDES – Chapter 38
Coordination with adjudication. Current practice is to coordinate the NPDES process with the adjudicative phase of a site review. This is implied in 463-30-300 but not explicit. Should it be more clearly articulated in chapter 38?
Public hearing on permit. WAC 463-38-042 seems to envision that a public hearing on NPDES permit would be adjudicative, which implies sworn testimony and cross-examination. This is not current practice. Should this rule be changed to simply require that the hearing be on the record?
Voting on permit. WAC 463-38-051 appears to limit voting on an NPDES permit to state agency members (i.e., not the chair or local members). This does not appear to be recent practice. Should the rule be changed to indicate that all members entitled to vote on a final recommendation are also voting on the NPDES permit?
Attachment to SCA. Although EFSEC's rules (463-39-095) only provide that air permits become attachments to a site certification agreement, it seems to be current practice that NPDES permits are also attachments. Should this be made explicit in rule?

E. Applications – Chapter 42
The following are typically included in applications, but not explicitly required by EFSEC rules.
Type of proposal. Should an application contain a description of the facility, including the basis for EFSEC's jurisdiction?
Energy benefits. Should an application contain a description of the energy benefits of the proposal?
Critical areas. Should an application state whether any portion of the site is in a critical area designated by local regulation adopted pursuant to RCW 36.70A.060?
Ownership interests. Should the rule clarify that an application should include all public as well as private ownership interests in the site? See

- 463-42-135(1).

F. SEPA – Chapter 47
Chapter 47 is currently written to apply only to "applications," though it is not clear from the rule whether this means only site certification applications, or is to be more broadly defined. (see 463-47-060) SEPA clearly applies to other council activities than site certification applications. Stakeholders are invited to comment on whether chapter 47 should be amended to reflect the broad range of activities that must comply with SEPA.

G. Independent Consultants – Chapter 50

Scope of work. WAC 463-50-040 is not a comprehensive list of current activities performed by independent consultants. Stakeholders are invited to comment on whether the list should include such activities as: considering comment and input from other stakeholders besides applicants (see first sentence of WAC); performing potential site studies, developing draft and final EISs.

Payment. WAC 463-50-050 is fairly prescriptive in terms of payment schedules. This does not reflect current practice, under which payment terms are negotiated on a case-by-case basis. Stakeholders are invited to comment on whether compensation processes should be more flexible to reflect current practice.

H. Fees or Charges – Chapter 58

Fees for application processing. The current practice is to charge applicants for council salaries in accordance with 463-30-055. Stakeholders are invited to comment on whether this should be made explicit in WAC 463-58-030.

I. Others

Stakeholders are invited to comment on other areas of current practice that are not now, but should be, made more explicit in EFSEC rules.

IV. Changes for clarity

This section addresses possible changes, other than ones already discussed in sections I-III above, which would clarify EFSEC's rules and practice. Again it is organized by chapter number for ease of reference.

A. Chapter 10 – Definitions

The following terms are defined in more than one chapter and could be included in this section instead: chair, site certification agreement or certification agreement, and energy facility. Stakeholders are invited to identify other definitions that should be included in this chapter.

B. Chapter 14 – Policy and Interpretation

Process. The rules do not currently present an overview of the entire process for evaluating an application, other than referring generally to the employment of a "deliberative process" in WAC 463-14-080. Should this rule, or another, be enacted that lays out the entire process in one section?

SEPA Policy. As noted in section I above, the council's expression of environmental policy is currently located in the chapter that relates to the EIS development process (463-47-110). Would it make more sense to move it to this policy section in order to give participants a more comprehensive statement of the major statutory policy directives that the council must follow?

C. "Informational Public Hearing," "Land Use Hearing" – Chapter 26

WAC 463-20-040 refers to the land use hearing being conducted as "adversary proceeding." This term does not appear to be defined anywhere in RCW. Stakeholders

are invited to comment on whether the rule should be changed to make it clearer what type of hearing is contemplated (e.g., simply made part of the record, or a hearing in which witnesses are under oath and cross examined as part of an adjudicative process).

Note comments in section I that this entire chapter will need to be rewritten to reflect the new process enacted under HB 2247. Provisions for introduction of counsel for the environment, explanation of the process, and opportunity for public comment could still be part of the informational public hearing now contemplated in the statute. Stakeholders are invited to comment on what procedurally is required for this event by using the term "hearing" and not "meeting."

C. Adjudicative Proceedings

Party status of member agencies. Current rules state that member agencies are "deemed parties" to a certification proceeding. However, in practice, they are really considered to be parties if they actually file a document indicating they intend to participate as parties. For example, other intervenors and applicants are not required to serve documents on member agencies that have not indicated they intend to participate in any way. Stakeholders are invited to comment on whether the rules should be clarified to say that member agencies are entitled to intervene, rather than being "deemed" parties. See

- 463-30-050
- 463-30-060

Representative status of member. 463-30-050 refers to a council member as a "representative," even though the intent of this rule is to clarify that a council member is *not* a representative. Since RCW 80.50.030 does not refer to members as "representatives," clarity could be achieved by using the term "member" rather than "representative" to refer to the council member for an agency.

Publicity. Currently, the rules require the council to prepare news media publications upon the "filing" of an application. Stakeholders are invited to comment on whether it would make more sense to defer publicity until the application is "received," assuming that "receipt" of an application entails a finding of completeness (see note above on application review and "receipt.")

Official notice. 463-30-230 sets forth the council's criteria for taking official notice. However, 30-310 generally adopts evidentiary rules of the APA by reference, which has its own official notice provision. Should this rule be deleted as duplicative? (If so, note 30-240 that now refers to 230 but could be rephrased to refer to any rule)

Intervention. Stakeholders are invited to comment on whether the council should continue to set its own intervention standards and criteria, or simply adopt RCW 34.05.443 as a standard. See

- 463-30-400
- 463-30-410.

D. Amendment/Termination of Site Certification Agreement

Sarah Blocki, former legal intern at EFSEC, recommended to the council that this chapter, together with miscellaneous rules dealing with termination, should be reorganized to make the rules clearer. One recommendation was to have termination provisions be in their own chapter instead of scattered throughout title 463. Stakeholders

are invited to comment on this general recommendation, as well as the specific issues described below.

When required. Should there be a general rule stating when amendments to an SCA are required?

Elements of request. Should there be a rule that specifies the format of a request for amendment?

Technical/Significant. Currently, WAC 436-36-070 and 080, which describe whether an amendment is "technical" or "significant" do not contain parallel language; therefore, it's not clear that when an amendment is not "technical" it is automatically "significant" and vice versa. Stakeholders are invited to comment on whether the two types of amendments should be made exclusive of each other.

Council actions. Separate rules currently describe the council's possible actions on amendment. Stakeholders are invited to comment on whether these (463-36-060, 070, and 080) should all be combined into one rule.

Termination. The following rules all deal with termination, suspension and restoration of a site certification agreement. Stakeholders are invited to comment on whether they should all be moved to a new chapter that deals with termination, suspension and restoration.

- 463-36-020
- 463-36-090
- 463-54-080
- 463-42-665
- 463-42-680
- 463-42-655
- 463-42-675

E. NPDES – Chapter 38

Stakeholders are invited to comment on procedural changes that would improve the clarity of this chapter, in addition to the ones set forth above and in this section.

Transmission to regional administrator. Current rule calls for a "proposed NPDES permit" to be transmitted to the regional administrator for comment. See WAC 463-38-064. The term "proposed NPDES permit" is not defined in this chapter and it is not clear whether this is a different document from a "draft" permit. If the "proposed permit" is taken to mean the document that the council has actually decided to recommend to the governor, there are timing concerns with allowing a 90-day comment period. Stakeholders are invited to comment on how this rule should be interpreted and how it fits in with the site review process.

Monitoring and enforcement. Two rules currently provide for monitoring by DOE – WAC 463-38-065 and 54-060. Stakeholders are invited to comment on whether both are needed.

F. Air Pollution Sources – Chapter 39

Permit issuance. WAC 463-39-095 states that a permit shall be effective "upon" the governor's approval and execution of the SCA. Stakeholders are invited to comment on whether the use of the word "upon" implies that it is the governor, not EFSEC, which is

issuing the permit. For example, would use of the term “on the date of” in place of “upon” more accurately reflect the fact that EFSEC is the issuer of the permit?

V. Technical Amendments

In addition to the rules and issues described in parts I-IV above, there are a large number of rules that contain out of date references, grammatical errors, obsolete terminology, incorrect captioning, multiple subject matter, etc. Rather than catalogue each of these and request comment, the council invites stakeholders to comment generally on preferred policies for dealing with technical amendments. The council intends to issue a document at some point in the future that will identify proposed technical corrections and will be open for public comment.